

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:  
THERESA DELA SANTA**

Petitioner

Theresa DelaSanta  
For the Petitioner

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Robert Goff

Department of Housing and  
Community Affairs

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Report and Recommendation by: Lynn A. Robeson, Hearing Examiner

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\* Board of Appeals No. S-2782  
\* (OZAH No. 11-06)  
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## HEARING EXAMINER'S REPORT AND RECOMMENDATION

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### I. STATEMENT OF THE CASE

In Petition No. S-2782, Theresa DelaSanta, seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 7610 Hammond Avenue, Takoma Park, Maryland. The legal description of the property is

Lot 3, Block 9, in the New Hampshire Gardens Subdivision. The property is owned by Malapad Development, Inc. Exhibit 1.

On September 30, 2010, the Board issued a notice of a public hearing before the Hearing Examiner for January 24, 2011. Ex. 11(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated January 11, 2011 (Exhibit 13), recommended approval of the Petition, with five (5) conditions. A Housing Inspector from the Department of Housing and Community Affairs (DHCA) inspected the property and issued his report on August 3, 2010.

The hearing went forward as scheduled on January 24, 2011. At the hearing, the Hearing Examiner raised the question whether Petitioner (Mrs. DelaSanta) met one of the threshold special conditions for approval of the special exception set forth in Section 59-G-2.00(b) of the Zoning Ordinance. That section requires that the “owner” of the property occupy the premises. Because the property is owned by Malapad Development, Inc., a real estate management corporation owned and operated by Petitioner’s family, the Hearing Examiner left the record open to permit the applicant to submit additional legal arguments as to whether Petitioner (Mrs. DelaSanta) met that special condition. The Hearing Examiner also requested Mrs. DelaSanta to submit certain corporate documents addressing the issues in the case. Petitioner did not submit any legal arguments, but did submit a Certificate of Good Standing for Malapad Development, Inc. (Exhibit 14(b)) and a corporate resolution authorizing Mrs. DelaSanta to “manage the property including the accessory apartment, without further permission, to the same extent that the corporation could, in the manner of an individual owner.” Exhibit 14(a).

For the reasons which follow, the Hearing Examiner concludes that Petitioner does *not* meet the requirements of Section 59-G-2.00(b) of the Zoning Ordinance, and therefore recommends that the petition be denied.<sup>1</sup>

## **II. SUMMARY OF FACTS**

The proposed accessory apartment is located in the basement of an existing one-family dwelling located at 7610 Hammond Avenue, Takoma, Maryland, in the R-60 Zone. Exhibit 12. The property is owned by the Malapad Development Company, Inc., a Maryland close corporation. The corporation was formed for the purpose of doing business in real estate management. T. 8. In addition to the subject property, the corporation also owns two apartment buildings on Houston Court in Takoma Park and Petitioner's father's residence in Wheaton, Maryland. T. 9.

Mrs. DelaSanta does not legally have a controlling interest in the subject property. Stockholders in the corporation include Mrs. DelaSanta's husband, her father and his wife. T.8. She and her husband own 38 percent of the shares and her father owns the remaining 62% of the shares. While she and her husband own only 38% of the corporation, they have a 50% vote in corporate matters. T. 12. Shareholders of the corporation may sell their shares without the consent of the other shareholders. Exhibit 15, p. 7.

At the public hearing, Mrs. DelaSanta testified that she has owned the property for twenty (20) years and it is her primary residence. T. 13. She has lived there since 1990 and intends to continue living there long-term. T. 13. She also testified that her father is 79 years old and therefore, she and her husband are "in fact" the corporation and operate the corporation on the daily basis. T. 20.

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<sup>1</sup> Should the Board decide to grant the Petitioner, the Hearing Examiner has included a list of recommended conditions in Section III.D of this Report designed to address the legal issues in this case.

### III. FINDINGS AND CONCLUSIONS

#### A. Special Conditions

Because the Hearing Examiner finds that Petitioner has failed to meet one of the special conditions for approval of an accessory apartment, this report will begin with an analysis of the special conditions.

In a special exception case, the applicant for a special exception has the “burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article.” *Montgomery County Code*, §59-G.1.21(c). A threshold requirement for approval of an accessory apartment special exception is that the “owner” of the property must occupy the main dwelling. Section 59-G-2.00(b) is set forth in pertinent part below:

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

The term “owner” is then further defined in subsection (b)(4):

(4) For purposes of this section, “owner” means an *individual* who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.

*Montgomery County Zoning Ordinance*, Section 59-G-2.00(b) (emphasis supplied).

The Hearing Examiner concludes that the Petitioner has not met this statutory requirement because she does not qualify as an “owner” under §59-G-2.00(b) of the Zoning Ordinance. Mrs. DelaSanta doesn’t “own” the property, nor does her parent or child own the property. Rather, a commercial real estate management corporation, Malapad Development, Inc., owns the property. This contravenes not only the plain language of the

law, but also potentially the Council's intent in requiring owner occupancy for an accessory apartment special exception.

Maryland courts have held that the primary goal when interpreting a law is to find and implement the Council's intent or goal when it adopted the law. There are several well-recognized "tools" the Board may use to ascertain the legislature's intent. The first tool the Board must apply is to give the words in the law their ordinary, popular, meaning. *Adventist Health Care, Inc. v. Md. Health Care Comm'n.*, 392 Md. 103, 125 (2006)("Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology"). If the "plain language" is not ambiguous, there is no need to delve further in discovering the Council's intent. The Board must also interpret the statute in a manner in which all the words or parts of the law make sense. The Board may not ignore or "read out" other sections of the law. *Wal Mart Stores, Inc. v. Holmes*, 416 Md. 346, 359 (2010).

The plain language of the accessory apartment special conditions defines an owner in terms of an "individual". The word "individual" means, "[O]f or relating to a single human being." *The New American Dictionary*, (2<sup>nd</sup> Edition, 1985). This definition does not encompass a corporation.<sup>2</sup> The Hearing Examiner does not find the statute ambiguous in this case.

Other parts of the ordinance also support an interpretation that the word "owner" was not intended to include corporations. In §59-G-2.00(b), there are two exceptions to the

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<sup>2</sup> The fact that there is a separate definition of "person" in the Zoning Ordinance, which includes *both* individuals *and* corporations, supports an interpretation here that the Council intended to limit eligibility for an accessory apartment to individual people. See, *Montgomery County Code*, Section 59-A-2.1 (A person is, "[A]ny individual, corporation, association, firm, partnership or the like, singular or plural.") The Council could have chosen the term "person" (used elsewhere in the Zoning Ordinance) if it had intended to include corporations or business entities as eligible "owners" of property for the purposes of obtaining approval of an accessory apartment.

requirement that the legal owner occupy the property: a parent or child of the legal owner may also occupy the property if they have a “significant equitable interest.” Corporations do not have “parents” or “children” in the colloquial sense.<sup>3</sup> Nor does a shareholder of a corporation hold an “equitable interest” in the property. *Elkton Electric Company, Incorporated v. Thomas W. Perkins, et. al.*, 145 Md. 224 (1924). An “equitable interest” is one which entitles the holder to transfer of legal *title* to property, not merely to a proportionate distribution of assets. *Id.*

Even were the term were ambiguous, interpreting the term “individual” as a human (as opposed to a business entity) better comports with the Council’s intent when enacting the accessory apartment special exception. First adopted in 1983, the law establishing accessory apartments as a special exception use was intended to achieve additional housing stock without impairing the character of residential neighborhoods. Forming a multi-department committee, the “Committee for the More Efficient Use of the Existing Housing Stock”, to study an accessory apartment program and the experiences of other jurisdictions, the Council stated that the Committee’s charge was “to make recommendations for changes in relevant laws, regulations and practices to permit and encourage more efficient use of the existing housing stock in a manner consistent with retaining neighborhood stability and character.” *Opinion*, Montgomery County Ordinance No. 10-13. Recognizing that rental housing had generated problems of substandard units and neighborhood deterioration in some areas of the County, key to the Committee’s recommendation was to include an owner-occupancy requirement “in order to ensure owner responsibility and involvement in the fulfillment of all conditions for the special exception, and that the public safety and welfare objectives

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<sup>3</sup> While there may be “parent” and “subsidiary” corporations, it is difficult to see how a commercial business entity could “occupy” the house for the purpose of this text amendment.

associated with the accessory apartment use are realized.” *Id.*; *Testimony of Rosalie Silverberg (Committee Chairman)*, Council Public Hearing On Ordinance 10-13 (November 1, 1983). After several amendments to the owner-occupancy requirement, some requiring at least 50 percent ownership, the current language was adopted. *Memorandum from Ralph D. Wilson to Councilmembers*, p. 1 (December 1, 1983). The Council also required that the accessory apartment program be revisited (5) years after adoption to determine whether accessory apartments achieved the goals of adding housing stock without impairing the residential character of single-family neighborhoods. *Montgomery County Ordinance No. 10-13*, Section 11.

True to its 1983 mandate, the Council revisited the accessory apartment law in 1989 after directing another multi-department committee to study the program. Owner-occupancy again was referenced as a key component of the program. The County Executive’s representative stated the basis for retaining the owner-occupancy requirement:

We are recommending keeping certain requirements. They be [sic] only in one-family detached houses, only in houses that are owner-occupied—and this is very important—the owner occupancy really makes this work because people are not going to want problem tenants in a house that they are living in the other half of—...

Testimony of Rick Ferrara, County Council Public Hearing on Zoning Text Amendment 89013 (June 13, 1989).

Thus, it appears that the owner’s *physical* occupancy of the house and the ability of the owner to remedy problems associated with the rental use, was a basis for adoption of both the 1983 and 1989 zoning text amendments authorizing accessory apartments as a special exception use.

Interpreting §59-G-2.00(b) to permit shareholders of commercial corporations to occupy the property as their principal residence doesn't further the goals of the statute as much as applying the plain language of the word "individual". While the Hearing Examiner believes the Petitioner when she states that she intends to remain in the property and use it as her primary residence, there is no guarantee that this would be the case in the future because she does not control the corporation. If there are concerns regarding the rental unit, she cannot force the corporation to act without its consent. Even though Petitioner and her husband may indeed "de facto" run the corporation, this may change through a sale or devise of corporate assets. One shareholder may sell his or her shares without the consent of the others. Exhibit 15, p. 7. Indeed, there could be a scenario in which legal title (held by Malapad Development, Inc.) could remain the same, but Petitioner would no longer have any interest in the corporation or the property.

While perhaps some of these issues could be addressed through conditions (recommended conditions if the Board approves the application are set forth in Section III.D of this report), it still remains that the corporate ownership doesn't meet the plain language of the statute. Further, while the corporation's consent to the conditions may be given now, it may also be taken away at some future date. Exhibit 15, p. 7. For these reasons, the Hearing Examiner concludes that Petitioner does not meet the owner-occupancy requirement set forth in §59-G-2.00(b).

Technical Staff found that the remaining special conditions had been met. Exhibit 12. Because the Petitioner adopted the Technical Staff Report as her own testimony, T. 5, and there is no evidence to the contrary in the record of this case, the Hearing Examiner finds that the remaining special conditions set forth in §59-G-2.00 have been met. Should the Board



disagree with the Hearing Examiner's conclusion as to the owner-occupancy requirement, the Hearing Examiner recommends imposing the conditions set forth in Section III.D. hereof.

### **B. General Conditions**

Should the Board disagree with the Hearing Examiners conclusion as to the owner-occupancy requirement, Technical Staff has found that the application meets the remaining general conditions. Exhibit 12. Having no evidence to the contrary, the Hearing Examiner finds that these remaining general standards have been met. As the primary evidence in this regard is the Technical Staff Report, it will not be reproduced here.

### **C. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. The Housing Code Inspector's report (Exhibit 13) notes certain issues, and recommends that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of three persons. Exhibit 13. Petitioners have agreed to meet all conditions noted in the Housing Inspector's report.

### **D. Alternative Conditions**

Should the Board disagree with the Hearing Examiner's conclusion that the petition does not meet the special standard requiring owner-occupancy of the apartment; the Hearing Examiner recommends the following conditions designed to attempt to limit the use, if approved, in a manner consistent with the special conditions for accessory apartments:

1. The Petitioner is bound by her testimony, representations and exhibits of record.
2. Petitioner, Mrs. Theresa DelaSanta, must occupy the property as her principal residence except for bona fide temporary absences not to exceed six (6) months in accordance with §59-G-2.00(b)(1).

3. The resolution of Malapad Development, Inc. (Exhibit 14(a)) authorizing Mrs. DelaSanta to manage the property to the same extent that the corporation may must not be terminated, altered, superseded, or otherwise become wholly or partially null, void or voidable.
4. The owner of the property, Malapad Development, Inc., must at all times own the property, be in good standing with the State of Maryland, and must not be dissolved, forfeited, or otherwise terminated.
5. Based on habitable space in the apartment (473.2 square feet), no more two unrelated persons or a family of three may reside in the accessory apartment.
6. Neither Petitioner nor Malapad Development, Inc., may receive compensation for the occupancy of more than one dwelling unit;
7. Petitioner must make all repairs required by the Department of Housing and Community Affairs as set forth in its memorandum dated August 3, 2010 (Exhibit 13), specifically:
  - a. Install egress window in bedroom to meet Montgomery County Code (5.7 square feet net clear opening and window must be no higher than 44 inches from floor to window opening).
  - b. Install trap on kitchen sink drain.
  - c. Bedroom wall that backs to HVAC room must be replaced with drywall.
  - d. Repair all kitchen outlets.
  - e. Install light glove in kitchen.
  - f. Paint kitchen walls and ceiling.
8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

#### **IV. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2782, which seeks a special exception for an accessory apartment to be located at 7610 Hammond Avenue, Takoma Park, Maryland, be **DENIED**.

Dated: March 9, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lynn A. Robeson', with a long horizontal line extending to the right.

Lynn A. Robeson  
Hearing Examiner